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Supreme Court, U.S.
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No. 95-1913
In the Supreme Court of the United States
October Term, 1995

THIOKOL CORPORATION, et al.,

Petitioners,

v.

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN; DOUGLAS B. ROBERTS, in his official capacity as Treasurer of the State of Michigan; and THOMAS M. HOATLIN, in his official capacity as Commissioner of Revenue of the State of Michigan,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Daniel M. Greenberg
Michael R. Bell
Assistant Attorneys General
Attorneys for Respondents

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QUESTIONS PRESENTED

The Michigan Single Business Tax ("SBT"), Mich. Comp. Laws § 208.1 *et seq.* is a value-added tax using an addition method of calculating value added. It requires taxpayers doing business in Michigan to include in their tax base "compensation", including payments to employee benefit plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Another Michigan statute, Mich. Comp. Laws § 205.27a(6), imposes a statute of limitations and requires taxpayers seeking refunds on the ground that the tax violates the federal constitution to file such claims within 90 days after the date set for filing a return.

Specifically the issues presented in this case are:

I. Whether ERISA § 514(a) pre-empts the Michigan SBT.

II. Whether ERISA § 514(a) pre-empts the statute of limitation in Mich. Comp. Laws § 205.27a(6).

III. Whether the federal courts have jurisdiction to consider a declaratory judgment seeking declaration that the statute of limitations in Mich. Comp. Laws §205.27a(6) violates the Due Process and Equal Protection Clauses of the United States Constitution.

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The amicus brief filed by the Committee on State Taxation was not available to the Respondents at the time the Brief in Opposition was being prepared, so pursuant to S. Ct. Rule 15.8 Respondents file this short supplemental brief to address the points raised by the amicus brief.

ARGUMENT

I.

MICHIGAN'S SINGLE BUSINESS TAX IS NOT PRE-EMPTED BY THE TESTS URGED ON THIS COURT BY AMICUS.

Amicus ask that a "line in the sand" be drawn regarding the pre-emption of all manner of state statutes. To this end Amicus has presented two tests which it contends will appropriately resolve future pre-emption cases. (Amicus p. 3).

The first test is the "magic word", specific reference, bright line test which would condemn all state statutes that merely refer to ERISA plans. The inadequacy of such a test has been addressed fully in Respondents' Brief in Opposition and by both the District Court and the Court of Appeals. It will not be further addressed here.

The second test seeks to evaluate the effect of a state law as follows:

> [I]f the effect of the state law in question is to exert downward pressure on the amount of the benefit fund that will be available for the provision of benefits, the law "relates to" such fund and must be preempted.

(Amicus p. 3).

This oblique statement does little to advance the analysis of what statutes should be subject to pre-emption. In this Court's most recent decision on this issue the Court stated that statutes resulting in indirect administrative costs

or having an economic influence on administrative decisions are not necessarily pre-empted. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___; 115 S. Ct. 1671; 131 L.Ed. 2d 695, 709 (1995). To this extent the Court has rejected an analysis that focuses solely on economic influences or downward pressure on the amount available for the provision of benefits.

In applying its "downward pressure" test, Amicus distinguishes taxes that are imposed on the assets or contributions to plans from those that are not. (Amicus p. 9). Under this analysis Amicus contends that the tax statutes at issue in *E-Systems, Inc. v. Pogue*, 929 F.2d 1100 (5th Cir. 1991); *In re Morgan Guaranty Trust Co. of New York v. Tax Appeals Tribunal*, 80 N.Y.2d 44; 599 N.E.2d 656 (N.Y. Ct. App. 1992); and *NYSA-ILA Medical and Clinical Services Fund v. Axelrod*, 74 F.3d 28 (2nd Cir. 1996), *on appeal to the U.S. S. Ct. sub nom, Debuono v. NYSA-ILA*, 64 U.S.L.W. 3806 (June 3, 1996), were appropriately pre-empted. Amicus goes on to state that Michigan's single business tax affects plans in the same way as the taxes at issue in the three cases above cited. (Amicus p. 9). This is simply not true.

In *E-Systems* the tax was imposed on what were denominated as "administrative or service fees". These "fees" included not only sums paid to service providers, but also claims and benefits paid by plans to beneficiaries. Further, the statute provided that if the service provider failed to make payment, liability attached to the plan. *E-Systems*, 929 F.2d at 1102. Evident in *E-Systems* was an impact on all ERISA relationships. *Id.* at 1103.

In *Morgan Guaranty Trust Co.*, the tax was a generally applicable tax statute that imposed a tax on gains derived from the transfer of real property within the state. The Court held the tax had "more than a tenuous, remote or peripheral connection to employee benefit plans." The Court stated:

> We reach that conclusion from analysis of the structural, administrative and economic impact of the tax on the Plan viewed against the backdrop of the terms and objectives of ERISA.

599 N.E.2d at 660.

The Court found that the statutes imposed record keeping and reporting requirements on the plan which would, therefore, impact directly on the plan. The Court also noted that the tax would impact the plan's investment strategy and that the tax is directly on the plan, thereby depleting assets already in the plan. 599 N.E.2d 660, 661.

In *NYSA-ILA* the Court of Appeals on remand underscored its finding of a direct and impermissible effect on qualified plans.

> The facts of the present case distinguish it from *Travelers*, because, unlike in *Travelers*, there is no third party between the plan and the tax imposed pursuant to the HFA. Rather, the statute at issue depletes the Fund's assets directly, and thus has an immediate impact on the operations of an ERISA plan. As we observed in our original opinion, the HFA imposes "an immediate tax on payments and contributions which were intended to pay for participants' medical benefits . . . [and] thus directly affects the Fund in its principal role as an employee welfare benefit plan."

Id. at 30 (citation omitted).

As fully discussed in the Brief in Opposition and by the lower courts in their opinions, the SBT does not tax contributions to plans, does not impact on the relationship between the ERISA entities, and does not impact ERISA plans in any manner that is more than "remote, tangential or peripheral." Accordingly, even if one accepts the validity of Amicus' analytical paradigm, its proper application to the

SBT results in a finding that the SBT is not subject to pre-emption.

II.

A GRANT OF CERTIORARI IN THIS CASE WILL NOT ESTABLISH THE "LINE IN THE SAND" AS SUGGESTED BY AMICUS.

Respondents, as officials responsible for the administration of state tax statutes, are sympathetic with Amicus' concern for, and desire for, clarity in defining the limits of ERISA pre-emption. At the same time Respondents acknowledge and respect the well-established judicial doctrine prohibiting advisory opinions and limiting the scope of decisions to the precise issues presented.

This Court's opinions on ERISA pre-emption establish an analytical framework giving due consideration to Congressional intent and appropriately focusing on the impact or effect of a particular state law on qualified plans. As recognized by this Court in *Trinova Corp. v. Michigan Dep't. of Treasury*, 498 U.S. 358; 111 S. Ct. 818; 112 L. Ed. 2d 884 (1991), the District Courts, and the Court of Appeals, the unique nature of the tax here at issue with its equivalent methods of calculation confirms that this is not a case amendable to yielding a rule applicable in other contexts.

RELIEF SOUGHT

Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Daniel M. Greenberg
Michael R. Bell
Assistant Attorneys General
Attorneys for Respondents

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